Supreme Court, U.S.
FILED

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No.

IN THE SUPREME COURT OF THE UNITED STATES

JEROME SOH, PETITIONER

v.

STATE OF WASHINGTON, RESPONDENT

ON PETITION FOR A WRIT OF CERTIORARI TO THE SUPREME COURT FOR THE STATE OF WASHINGTON

PETITION FOR A WRIT OF CERTIORARI

WILLIAM JOHNSTON
State of Washington #6113
Counsel of Record
401 Central Avenue
Bellingham, WA 98225
(360) 676-1931

QUESTIONS PRESENTED

1. May a prosecutor "insulate" a testifying accomplice for purposes of cross-examination by consenting to a testimonial agreement with the accomplice's attorney, when the attorney does not disclose the agreement to her client?

2. Does the prosecutor's failure to disclose this agreement to the defendant, and the trial court's suppression of it to the jury, violate defendant Jerome Soh's 14th Amendment right to due process and a fair trial?

3. May the prosecutor remain silent while a Washington State Patrol officer testifies falsely that he did not make a testimonial agreement with the accomplice's attorney?

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OPINION BELOW

The original opinion of Division One of the Court of Appeals of the State of Washington is reported at 115 Wash. App. 290, 62 P.3d 900 (February 3, 2003). The Washington Supreme Court denied review of this case on September 30, 2003.

JURISDICTION

This Court has jurisdiction under 28 U.S.C. 1254 (1).

CONSTITUTIONAL PROVISION INVOLVED

This case raises issues under the Fourteenth Amendment to the United States Constitution.

STATEMENT OF FACTS

The Washington Court of Appeals stated succinctly the facts of this case:

"In late spring of 2000, the Washington State Patrol (WSP) began a sting operation involving stolen automobile parts. The operation focused on the activities of Jerome Soh, a dealer in automobile parts residing in Canada. Based on information from a confidential informant, WSP Detective Liburdi arranged three controlled sales of stolen auto parts to Soh in September, October, and November, 2000.

On December 1, 2000, Soh was arrested in connection with these sales. Police searched Soh's storage locker in Blaine and recovered a stolen engine and several canceled checks made out to Justin Thomas. Thomas was arrested and charged as a codefendant. Thomas had previously worked as an informant for the WSP. He immediately agreed to cooperate with law enforcement by providing information on his dealings with Soh and by testifying in Soh's trial in exchange for "consideration at sentencing." This agreement was disclosed to Soh in discovery, and Soh's counsel interviewed both Thomas and Detective Liburdi regarding their expectations from Thomas' cooperation. Charges against Thomas were severed, and Soh's trial date was reset to March 12, 2001.

On February 27, shortly after Thomas' trial was severed, an exchange occurred involving Thomas' attorney, the deputy prosecutor, and Detective Liburdi. The meeting apparently resulted in a promise of a "substantial reduction of the charges" against Thomas. Specifically, in exchange for his cooperation and testimony against Soh, the WSP agreed not to pursue charges relating to numerous auto theft offenses outside Whatcom County to which Thomas had confessed upon his arrest.

This agreement was not disclosed to Soh. It came to the attention of Soh's attorney, however, who filed a motion to dismiss pursuant to CrR 8.3(b). The State denied that any agreement had been made. In an in camera proceeding, Thomas' attorney testified that there had, in fact, been such an agreement. She testified that she had

not revealed those further promises to her client.

The court found the additional agreement had been made, but denied Soh's motion to dismiss because Thomas had never learned of it, and Soh was therefore not prejudiced. Soh was convicted of two counts of possession of stolen property." State v. Soh, 115 Wn. App. 290, 292-93, 62 P.3d 900 (2003).

A. The Testimonial Agreement between the State of Washington and Justin Thomas

This case illustrates the dangers from informal, unwritten promises of leniency. In any case that rests exclusively on the credibility of an accomplice's testimony, the jury questions the credibility of a witness in proportion to the benefit the witness obtains by testifying. Here, deputy prosecuting attorney Rosemary Kaholokula voiced her concern that she could not give a written commitment to Ms. Coleman, the attorney for Justin Thomas because she did not want "to ruin him as a witness." Ms. Coleman testified that she did not advise her client of the benefits she had obtained for him. Those benefits were:

(1) A commitment by deputy prosecutor Kaholokula "to reduce the charges pending in Whatcom County" (Thomas was charged with four (4) counts);

(2) A commitment from Washington State Patrol detective Mark Liburdi to make sure Thomas would not be prosecuted on the approximately 25 car thefts Thomas had confessed to in the spring of 2000.

In withholding this information from her client, Ms. Coleman violated her ethical responsibilities under RPC 1.2 and under State v. James, 48 Wn. App. 353, 739 P.2d 1161 (1987) but nevertheless secured a favorable deal for her client and also secured for the State an uninformed witness insulated from effective cross-examination. The Court of Appeals erred by finding no prejudice from this practice, ensuring its continued use by the State in future trials. Because this

practice deprived Soh of a fair trial, the Court of Appeals opinion conflicts with the due process guarantees of the Fourteenth Amendment.

Next, the prosecutor violated Soh's due process rights by not correcting testimony she knew to be false. The deputy prosecutor called WSP detective Mark Liburdi and presented testimony that Liburdi made no commitment to take care of Thomas's King County car thefts. Yet the record flatly contradicts this testimony:

1. Geri Coleman, attorney for accomplice Justin Thomas, testified at VRP pages 231, lines 20-25 that Detective Liburdi told her, "they were not interested in pursuing those other cases, potentially other cases against him, and that was the position of Washington State Patrol. And that I could contact his supervisor if I needed more assurance on that."

2. At VRP vol. 2 p 244 lines 13-18, Deputy Prosecutor Kaholokula stated:
"I think Detective Liburdi said he wasn't interested in pursuing them (crimes in other counties) but I don't think they have anything to do with me. So I focused on the charges that I had with Mr. Thomas and Soh."

3. Contrary to what Coleman and Kaholokula heard him say, Detective Liburdi testified in a pretrial affidavit as well as at trial before the jury, that he did not know what would happen to Justin Thomas's exposure for the approximately 25 car thefts he had confessed to in March of 2000. Liburdi said that decision was up to the Issaquah Police Department.

B. <u>The Washington Court of Appeals Criticized the Prosecutor's Actions, But Let Soh's Conviction Stand</u>

The Court of Appeals acknowledged that a very favorable sentencing agreement had been reached between the State and the testifying accomplice, Justin Thomas, but accepted the testimony of

the accomplice's attorney that she had not disclosed this agreement to her client. The agreement was the deputy prosecutor's promise to substantially reduce the charges against the accomplice and the commitment of the Washington State Patrol Sergeant that charges against the accomplice involving numerous auto thefts in another county would not be prosecuted.

Because the defense attorney testified that she did not disclose the agreement she reached on behalf of her client to her client, the Court of Appeals concluded that the trial judge ruled correctly when he barred the defense from calling the deputy prosecutor and the accomplice's defense attorney to apprise the jury of the complete agreement which resulted in the accomplice's providing testimony in the case.

Because the sentencing agreement had not been communicated to the accomplice, the Court of Appeals concluded that evidence of the actual sentencing agreement reached was not relevant to the issue of the credibility of the accomplice, citing Willhoitte v. Vasquez 921 F2d. 247 (9th Cir. 1990) and Hayes v. Woodford, 301 F. 3d at 1074 in a footnote as authority for its decision. Soh, 115 Wn. App. at 296 n. 15. The court did not address in its opinion the application of the federal precedent cited by petitioner, Napue v. Illinois 360 U.S. 264, 79 S.Ct. 1173, 3 L. Ed2d 1217 (1959), Giglio v. United States 405 U.S. 150, 92 S.Ct. 763, 31 L.Ed2d 104 (1972), Boone v. Paderick 541 F.2d 447 (4th Cir. 1976), Campbell v. Reed 594 F.2d 4 (4th Cir. 1979).

ARGUMENT WHY REVIEW SHOULD BE GRANTED

A. The State Court Tolerated Due Process Violations

This case presents the tactic of insulating a testifying witness by not telling the witness of the bargain secured by his counsel. The trial court upheld this arrangement by ruling that since the cooperating witness did not know of the bargain secured for him, the substance of the bargain secured for him could not be presented to the

jury. The Court of Appeals affirmed the Superior Court on the same rationale:

> What Thomas did not know could not supply a motivation for him to testify falsely. The agreement to "reduce" the charges was never communicated to Thomas and therefore had no impeachment value. Soh 115 Wn. App. At 296.

The next question for review involves whether the State committed misconduct so egregious as to require reversal or dismissal. The deputy prosecuting attorney prosecuting the case presented testimony which she personally knew to be false. Although this issue was squarely raised in petitioner's brief (see Assignments and Issue Pertaining to Assignments 1-5), and discussed at length in oral argument before the Court of Appeals, the Court of Appeals never addressed it in its written opinion. Petitioner proposed to call deputy prosecutor Kaholokula and defense counsel Geri Coleman for the purpose of presenting their testimony that Liburdi acting on behalf of the Washington State Patrol had promised Geri Coleman that Thomas would not be prosecuted for the King County car thefts which he had confessed to. The trial court prohibited petitioner from calling these witnesses who would have impeached Liburdi.

Defendant Soh suffered prejudice as a result of these errors. Soh was subjected to a trial in which the true and complete testimonial agreement reached for Justin Thomas was excluded from the jury's consideration because of the misconduct of the State. Unless reviewed and reversed, this case presents in the state courts of Washington a recipe to construct a trial on false pretenses, that is, the true testimonial agreement secured by the accomplice is kept from the jury because of the accomplice's attorney's breach of his ethical obligation to advise the client of any and all offers made to plead guilty or to testify; see State v. James, 48 Wn. App. 353, 739 P.2d 1161 (1987)

The trial court in denying Soh's motion to dismiss rewarded the State for its deception and misconduct by giving the state exactly what it wanted: the complete testimonial agreement between the State of Washington and Justin Thomas was kept from the jury. The

Court of Appeals' decision in affirming this approach creates an incentive for this unethical practice any time any deputy prosecutor wants to secure a conviction and needs to keep its primary witness clean before the jury. The court's opinion also sends a message to the defense bar that it is all right to break the rule of fully informing the client of any and all deals secured –if the deal is sweet enough.

Being forced to stand trial where the entire case rests on the credibility of an accomplice, and the true complete agreement which in fact secured his testimony is kept from the jury because of the misconduct of the state and other defense counsel, is substantial prejudice in terms of CR 8.3(b). It is a constitutional violation of the highest magnitude when it is uncontested as here that false testimony was knowingly presented by a deputy prosecutor to secure a conviction. Deputy prosecutor Kaholokula by her own on the record statement was a witness to a commitment by Washington State detective Mark Liburdi to not pursue those Thomas King County charges yet she presented Liburdi's testimony that no such commitment had been made and argued that Liburdi was a credible and believable witness.

B. The State Court's Decision Conflicts with Established Federal Caselaw

The cases cited by the Court of Appeals to support its decision do not involve the pervasive prosecutorial and other counsel misconduct found in this case. In Willhoitte v. Vasquez 921 F2d. 247 (9th Cir. 1990), the Ninth Circuit distinguished Giglio v. United States, supra, on the basis that Giglio rested solely on the testimony of one witness, whereas in Willhoitte there was testimony of Willhoitte's ex-girlfriend, testimony of other witnesses concerning incriminating statements and testimony of other witnesses linking both defendants through incriminating statements. In other words, Willhoitte, in rejecting the argument presented in that case, used a harmless error type analysis. The Court of Appeals' analysis in this case does not reach the question of harmless error because it concludes that since the witness did not know anything there is no impeachment value from evidence of the true deal, and it is collateral. Even in Willhoitte this approach was not taken.

In this case, the jury should have been presented with both prongs of the testimonial agreement reached on behalf of Justin Thomas by his attorney Geri Coleman: Kaholokula's commitment to reduce the Whatcom County charges and Liburdi's commitment to take care of the multitudinous car theft charges in King County. If that had been done, deputy prosecutor Kaholokula, who was a witness to Liburdi telling Coleman that he would take care of the charges in King County, could not have later argued to the jury that all Justin Thomas was to get was leniency. How could deputy prosecutor Kaholokula present the testimony of Detective Liburdi which contradicted her own recollection? The fact is she could not and had this information been presented by way of testimony of Kaholokula and Coleman, it is likely that the jury would have speedily acquitted Soh.

In the other case which is cited in the Court of Appeals opinion to support its decision, Hayes v. Woodford, the Ninth Circuit predicated its result on the basis that "despite our disapproval of the prosecution's conduct, even if James did give perjured testimony, we cannot say that here is a reasonable probability that without all the perjury the result of the proceeding would have been different." Hayes, 301 F. 3d at 1074. It should be noted that in Hayes v. Woodford the case before the Ninth Circuit was a habeas corpus petition where the burden was expressly on the appellant to show prejudice.

Here again, presentation of evidence of both prongs of the Thomas testimonial agreement would have given the jury greater pause in assessing the credibility of Thomas' testimony. If the jury believed Coleman's or Kaholokula's testimony, they would have presumably stricken entirely the testimony of Liburdi as a credible witness. Under these facts, there is more than a reasonable probability, particularly since the jury hung on many counts, that the result would have been different. Soh would have been able to force the confrontation between, on one hand, the testimony of Coleman and Rosemary Kaholokula, and, on the other hand, the testimony of Liburdi -- as well as to present to the jury the true state of affairs concerning the relationship between Justin Thomas and State of Washington.

In Philips v. Woodward, 267 F.3d 966, 986 n.14 (9th Circuit 2001) the Ninth Circuit cited footnote 9 in the United States Supreme Court's decision in Brecht v. Abrahamson 507 U.S. 619, 113 S.Ct. 1710, 123 L.Ed2d 353 (1993). In that case, the Supreme Court noted " a deliberate and especially egregious error of the trial type, or one that is so combined with a pattern of prosecutorial conduct" as to "infect the integrity of the proceedings" warrants "the grant of habeas relief even if it did not substantially affect the jury's verdict." Brecht, 507 U.S. at 638 n.9.

To the extent that the Court of Appeals' analysis of the case is correct, the decision rewards prosecutorial misconduct and permits, as here, a trial to proceed where the defense is prevented from enlightening the jury of the true state of affairs and the prosecution is allowed to proceed and argue false premises to the jury. The jury hears that Thomas is going to get leniency at sentencing on the Whatcom County charges and Detective Liburdi does not know what is going to happen in King County, when all officers of the court present know that Liburdi has promised Thomas' attorney nothing will happen as a result of his King County crimes and the state has promised to substantially reduce his Whatcom County charges. The Court of Appeals condoned this falsehood.

In short, Soh was prejudiced; but also, petitioner's trial was infected with the fruits of prosecutorial misconduct and should be dismissed even if there was no prejudice.

The Federal Circuit Courts and State Courts, considering cases in which this subterfuge is utilized and instigated by the prosecution, all conclude that evidence of the true nature of the deal is material. These cases, Campbell v. Reed 594 F.2d 4 (4th Cir. 1979); Boone v. Paderick, 541 F.2d 447 (4th Cir. 1976) and Burkhalter v. State 493 S.W.2d 214 (Tex. Crim. App. 1973) are at odds with the unique position taken by the Court of Appeals. The Court of Appeals in its opinion gave no explanation as to why the reasoning in these decisions is erroneous.

If evidence of the true testimonial agreement is material, Soh contends that allowing the superior court judge to decide whether defense attorney Geri Coleman is truthful when she said that she did not disclose to her client the contents of the testimonial agreement she secured for him, intrudes upon the defendant's right to have the jury determine material facts.

No authority is cited in this opinion for creating a mechanism allocating to the Superior Court judge the responsibility for fact finding about the credibility of a material witness such as Coleman. It is unethical for an attorney not to disclose a deal to her client and this fact makes it questionable whether she did in fact entirely keep it from him. Again allowing the judge to decide rewards the State for its misconduct by keeping evidence which is supposed to go to the jury from getting there. This approach will lead to the flourishing of the misconduct practice described in Willhoite as a "pernicious scheme without any redeeming features." 921 F.2d at 251.

This court should enforce the ethical rule that defense counsel must fully advise the client of any and all testimonial agreements reached with the state before the client provides testimony in court thus allowing the case to go forward as it should have gone forward. Anything less will allow the unethical and deceptive scheme used in this case to insulate the accomplice witness from cross examination to flourish and encourage deception from prosecuting attorneys and other attorneys upon the court as took place in this case.

For another reason, Willhoitte v. Vasquez and Hayes v. Woodford do not support the result reached here. Deputy prosecuting attorney Rosemary Kaholokula improperly presented Liburdi's testimony even though it contradicted her own on the record recollection and statement that Liburdi had committed to Geri Coleman that Thomas' car thefts in King County would not be pursued. In addition to presenting testimony which she personally knew to be false, she argued the same falsehoods – that Thomas had only been promised leniency at sentencing - in her final summation to the jury.

This conduct violates Washington's Rule of Professional Conduct 3.3 (a) (4), which prohibits a lawyer from offering evidence

that the lawyer knows to be false. It also violates RPC 3.3 (c) which provides "if the lawyer has offered material evidence and comes to know of its falsity, the lawyer shall promptly disclose this fact to the tribunal unless such disclosure is prohibited by rule 1.6." Not only did the deputy prosecutor not comply with RPC 3.3 (c), she argued to the jury that Justin Thomas was only going to get leniency, even though she stated on the record she heard Liburdi promise Coleman that he and his WSP supervisor would make sure that Thomas was not prosecuted for his King County car thefts.

The Court of Appeals has found that the actions of the Deputy Prosecuting Attorney were misconduct. The misconduct was not informing the defense counsel of the full nature of the deal reached between the State of Washington and Justin Thomas. A more serious transgression is one not addressed by Court of Appeals in its opinion. That is the effect of Ms. Kaholokula's argument to the jury, urging them to convict Soh on the basis that Thomas' testimony would only get him leniency in sentencing on the Whatcom County charges.

The argument of deputy prosecuting attorney Rosemary Kaholokula, that the witness was only going to get leniency, when made by a prosecutor who had promised his attorney a substantial reduction in charges and in addition had been present to hear Detective Liburdi's representations that the WSP would fix the remaining 20 plus charges in King County, constitutes a record showing that the deputy prosecutor made factual arguments to the jury which she knew well were false.

Hayes v. Woodford supra, is also significantly different factually. The court's discussion of the operative issues in that lengthy opinion are found at head notes 26 through 30 particularly head note 29. There the Ninth Circuit assesses and analyzes the argument of the government's attorney to the jury to determine whether the integrity of the proceeding was infected. The Ninth Circuit was "troubled by the prosecutor's statements to the trial court that "there has been absolutely no negotiations whatsoever in regard to his testimony. No promises, no discussions about this offense at all. However these statements were outside the presence of the jury and thus did not affect the verdict." Hayes, 301 F.3d at 1074.

Paragraphs later, the Ninth Circuit cites Phillips v. Woodford 267 F. 3d 966 9th cir (2001) for the proposition that where the prosecutor argues that the witness should be believed and that the witness has not been promised anything in return for his testimony and the prosecutor has reason to know such is not the case, reversal is required. Then the court in Hayes v. Woodford distinguishes Phillips stating "that Hayes v. Woodford was unlike Phillips where the prosecutor's closing argument emphasized that the "witness had never been promised anything in return for his testimony" 267 F. 3d at 983-984." Finally James's testimony (the insulated witness in Hayes) was not crucial to the prosecution's case because Hayes had made a statement to the same effect before he made the deal with the government for his testimony. 301 F. 2d at 1074-1075.

The court in Hayes v. Woodford also distinguished its facts from both Phillips v. Woodford 267 F. 3d 966 9th cir (2001) and as well a more recent case, Killian v. Poole, 282 F.2d 1204 (9th Cir. 2002) which was reversed . In Killian, the facts were similar in that the government's case rested upon the testimony of an alleged accomplice. In Killian, the alleged accomplice Gary Masse after he had been tried and convicted of felony murder and sentenced to life imprisonment without the possibility of parole contacted the Sacramento Sheriff's Department to see if any deals could be struck. Assured that the state would assist in a sentence reduction, Masse implicated Killian.

Masse testified at Killian's trial that he had no deals with the government. The court assumed but did not find that the prosecutor knew Masse's testimony was false when he presented it to the jury. The conviction was reversed.

Unlike in Hayes v. Woodford in this case the evidence presented by Geri Coleman puts this case in a completely different setting as one which is extremely thin. Like the facts in Campbell v. Reed, supra, the entire case was predicated upon the testimony of Justin Thomas as augmented by the testimony of Liburdi.

Moreover, the argument of the deputy prosecuting attorney to the jury that Thomas was only going to get leniency when in fact he was to get a substantial reduction in charges and forgiveness of 20 plus felonies in King County, totally distorted the picture of affairs concerning Thomas.

Those decisions cited by the Court of Appeals respectfully do not support the court's application of those precedents to the facts before the court in this case.

CONCLUSION

Soh respectfully requests that this court grant review and reverse and dismiss for egregious misconduct. The court should hold that when the insulation of witness problem is encountered in the criminal trial that the only available proper remedy at that point is to have the Superior Court direct the defense attorney to provide complete disclosure of the agreement to the client. If a defense attorney in such a circumstance defies the court and refuses to exercise his/her responsibilities under State v. James, supra, then the Superior Court should inquire of the defense attorney as to whether or not his/her decision not to fully inform the client of the deal provided was in any way related to a request to do so by the state. If the answer is affirmative the court should dismiss the case in the interest of justice under Cr.8.3b.

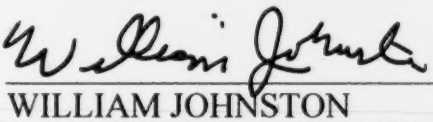
The history of the cases in which this pernicious practice of insulating a key witness from effective cross examination has been considered as well as deputy prosecuting attorney's statement "she did not want to ruin Thomas as a witness," support the reality that Ms. Coleman's decision to embark upon unethical conduct was motivated by her desire to see her client get the best possible arrangement which would be predicated upon her client not being informed of the deal so he "could not be ruined on cross-examination."

If this conviction stands, the court will be approving criminal behavior – a conspiracy to obstruct justice between the deputy prosecutor and defense counsel Coleman – a conspiracy to deprive Soh of his constitutional right to a trial. A fair trial is one in which

the state does not present false testimony and argument to secure a conviction. If the insulated witness gambit was not seen as necessary to achieve Soh's conviction, the state would not have engaged in the misconduct.

This case should be dismissed. If the court does not dismiss the case but remands the case for a new trial, petitioner should be awarded terms, specifically his attorney fees and costs in the trial and appeal since he was subjected by the misconduct of the state to a trial under false pretenses.

DATED this 26th, day of December 2003.



WILLIAM JOHNSTON
Attorney for Petitioner Soh
401 Central Avenue
Bellingham, Washington 98225
Phone: 360 676-1931
Fax: 360 676-1510

APPENDIX A

WASHINGTON STATE COURT OF APPEALS
DIVISION ONE

No. 48433-8-I
State v. Soh,115 Wn.App 290, 62 P.3d 900 (2003)

STATE OF WASHINGTON, RESPONDENT

v.

JEROME SOH, APPELLANT

OPINION PUBLISHED IN PART
FILED FEBRUARY 3, 2003

ELLINGTON, J. - Prosecutorial misconduct may require dismissal of all charges where it results in prejudice to the right to a fair trial. Here, the State failed to disclose a promise of leniency made to its key witness. Jerome Soh learned of the promise before trial, however, and fails to show that the State's misconduct prejudiced his right to a fair trial. We therefore affirm Soh's convictions. We address other issues in the unpublished part of this opinion.

FACTS

In late spring of 2000, the Washington State Patrol (WSP) began a sting operation involving stolen automobile parts. The operation focused on the activities of Jerome Soh, a dealer in automobile parts residing in Canada.

Based on information from a confidential informant, WSP Detective Liburdi arranged three controlled sales of stolen auto parts to Soh in September, October, and November, 2000.

On December 1, 2000, Soh was arrested in connection with these sales. Police searched Soh's storage locker in Blaine and recovered a stolen engine and several canceled checks made out to Justin Thomas. Thomas was arrested and charged as a codefendant. Thomas had previously worked as an informant for the WSP. He immediately agreed to cooperate with law enforcement by providing information on his dealings with Soh and by testifying in Soh's trial in exchange for "consideration at sentencing."[1] This agreement was disclosed to Soh in discovery, and Soh's counsel interviewed both Thomas and Detective Liburdi regarding their expectations from Thomas' cooperation. Charges against Thomas were severed, and Soh's trial date was reset to March 12, 2001.

On February 27, shortly after Thomas' trial was severed, an exchange occurred involving Thomas' attorney, the deputy prosecutor, and Detective Liburdi. The meeting apparently resulted in a promise of a "substantial reduction of the charges"[2] against Thomas. Specifically, in exchange for his cooperation and testimony against Soh, the WSP agreed not to pursue charges relating to numerous auto theft offenses outside Whatcom county to which Thomas had confessed upon his arrest.

This agreement was not disclosed to Soh. It came to the attention of Soh's attorney, however, who filed a motion to dismiss pursuant to CrR 8.3(b). The State *denied that* any agreement *had* been made. in an in camera proceeding, Thomas' attorney testified that there had, in fact, been such an agreement. She testified that she had not revealed those further promises to her client. The court found the additional agreement had been made, but denied Soh's motion to dismiss because Thomas had never learned of it, and Soh was therefore not prejudiced. Soh was convicted of two counts of possession of stolen property.

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[1] Report of Proceedings (RP) (Mar. 22, 2001) at 12.
[2] RP (Mar. 22, 2001) at 232.

BEST AVAIL

DISCUSSION

Soh appeals the denial of his motions to dismiss and for a new trial for prosecutorial misconduct, and also contends that the trial court abused its discretion in refusing to allow him to call Thomas' attorney, the deputy prosecutor, and an expert on legal ethics to testify at trial regarding the undisclosed agreement.

The court conducted a hearing on Soh's motion to dismiss. Thomas' attorney, Ms. Coleman, testified in camera that the February 27 meeting occurred because she was not comfortable allowing Soh's attorney to interview her client without further assurances from the State. The deputy prosecutor responded she did not want to "ruin [Thomas] as a witness,"[3] or words to that effect,, and asked Coleman to trust her. Coleman had apparently teamed, however, that Thomas' initial agreement to cooperate was obtained when Detective Liburdi contacted Thomas without her knowledge, after she had formally appeared as Thomas' counsel. Coleman therefore told the prosecutor that she needed "something more substantial"[4] by way of reassurance than just the deputy prosecutor's promise, given that the deputy prosecutor had permitted a law enforcement officer to talk to her client without her knowledge.

Coleman testified Detective Liburdi then told her the WSP would not be interested in pursuing further charges against Thomas beyond those. pending in Whatcom county. This apparently meant that WSP would not refer for prosecution any of the numerous auto thefts in the Bellevue area to which Thomas had confessed at the time of his arrest. Detective Liburdi told Coleman she could contact his supervisor for further assurances. Coleman then asked for assurances from the deputy prosecutor, who responded with some form of the phrase "substantial reduction of the charges."[5] Coleman testified she had never communicated this promise to her client, nor had she used that phrase in speaking with him.

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[3] RP (Mar. 20, 2001) at 231.

[4] RP (Mar. 20, 2001) at 231.

[5] RP (Mar. 20, 2001) at 232.

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The trial court explicitly found Coleman's testimony credible. The court found that while there was "no oral or written plea bargain . . . there clearly was a commitment by the State as communicated to Thomas through the state patrol and as communicated by the prosecutor to Thomas' defense counsel. There was a benefit being extended for Thomas' cooperation and testimony."[6]

The State is required to disclose exculpatory evidence, including impeachment evidence.[7] Promises of leniency to witnesses may affect the witness' credibility and must be disclosed.[8] Failure to disclose a promise of leniency may also violate the due process clause of the Fourteenth Amendment.[9] Where prosecutorial misconduct has materially affected the right to a fair trial, CrR 8.3(b) may require dismissal.[10]

The State maintains it had no duty *of* disclosure here, because the deputy prosecutor never reached a formal agreement with Thomas beyond the original promise *of* consideration at sentencing. We disagree. Thomas was a key witness for the State; his motives in testifying could be affected by any promise *of* leniency.

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6 RP (Mar.20, 2001) at 272-73.

7 See Brady v. Maryland, 373 U.S. 83, 87, 83 Sup. Ct. 1194, 10 L. Ed. 2d 215 (1963); State v. Benn, 120 Wn.2d 631, 650, 845 P.2d 289 (1993).

8 Giglio v. United States, 405 U.S. 150, 154-55, 92 S. Ct. 763, 31 L. Ed. 2d 104 (1972); Brady, 373 U.S. at 87.

9 Giglio, 405 U.S. at 154-55.

10 CrR 8.3(b) provides: "The court, in the furtherance of justice, after notice and hearing, may dismiss any criminal prosecution due to arbitrary action or governmental misconduct when there has been prejudice to the rights of the accused which materially affected the accused's right to a fair trial. The court shall set forth its reasons in a written order."

Whether the promise was memorialized by a specific written agreement is not determinative."[11] Nor is the fact that a promise was made by a police officer rather than a deputy prosecutor.[12]

Whether the deputy prosecutor believed she could enforce an agreement relating to charges in other counties is irrelevant. The question is whether the offer of leniency may have any impeachment value. If so, it is exculpatory and must be disclosed. [13]

It is difficult to imagine an offer of leniency in exchange for testimony that would not have impeachment value. Further, here the prosecutor herself endorsed the detective's promise, which was made only because Coleman insisted upon further assurances before subjecting Thomas to an interview. The State's failure to disclose the promise constituted misconduct. [14]

The next question is whether Soh has shown prejudice to his fair trial rights. The trial judge concluded he had not, because the undisclosed promises of consideration had never been communicated to Thomas. We agree.

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[11] See Boone v. Paderick, 541 F.2d 447, 451 (4th Cir. 1976) (tentativeness of promise of leniency may increase its relevance by creating greater incentive for witness to tailor testimony to satisfy prosecution); Campbell v. Reed, 594 F.2d 4, 6 (4th Cir. 1979) (due process violated where witness' attorney told client only that "everything would be all right," and witness later testified that he had not made any agreement); Burkhalter v. State, 493 S.W.2d 214, 217-18 (Tex. Crim. App. 1973) (due process violated where State reached immunity agreement with witness' counsel, witness was told only that testifying "could help his case," and witness testified that no immunity agreement existed).

[12] See Boone, 541 F.2d at 450-51 (due process violated where prosecutor failed to disclose offer of leniency made by police officer).

[13] See Brady, 373 U.S. at 87; Benn, 120 Wn.2d at 650

[14] The trial court explicitly found misconduct only in regard to a separate issue, the deputy prosecutor's representation to the court that the extent of her communication with Thomas' counsel consisted only of two e-mails.

What Thomas did not know could not supply a motivation for him to testify falsely. The agreement to "reduce" charges was never communicated to Thomas and therefore had no impeachment value.[15]

Further, the entire exchange of communications was revealed to Soh before trial, and his counsel was thus able to fully prepare to cross-examine Thomas about his motives for testifying. Thomas testified he had agreed to cooperate in exchange for consideration at sentencing, as promised by Detective Liburdi. Thomas also testified that he had previously cooperated with the WSP in exchange for not being charged with more than 20 car thefts, and that he had thereafter taken part in an additional 13 or 14 car thefts, to which he had confessed, resulting in only four charged counts (as opposed to Soh's six). Thomas was cross-examined as to any deal he might have been aware of regarding the additional thefts, or any belief that he might avoid jail time. Thomas responded that he expected to plead guilty to the four charged counts, but believed he likely would go to jail.

Thomas appears to have been truthful as to the consideration he expected in exchange for his testimony. This case is thus unlike those in which witnesses expressly and falsely denied having made any plea agreements or expecting any consideration from the State.[16] Soh was fully informed before trial, and had a full and fair opportunity to cross-examine Thomas. The record thus does not demonstrate prejudice to Soh's right to a fair trial.

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[15] See Willhoite v. Vasquez, 921 F.2d 247 (9th Cir. 1990) (no due process violation where witness had not been informed of agreement his attorney had reached with the State); Haves v. Woodford, 301 F.3d 1054, 1073-74 (9th Cir. 2002) (no due process violation where witness had no knowledge of deal, communicated only to his attorney, that was more extensive than that to which witness testified).

[16] See Giglio, 405 U.S. at 152; Campbell, 594 F.2d at 6; Burkhalter, 493 S. W.2d at 217.

Soh contends he should have been permitted to call the deputy prosecutor, Thomas' attorney, and an expert on legal ethics at trial to impeach Thomas' testimony. But Thomas' attorney had testified in camera that she did not tell Thomas about the reduced charge offer; calling her as a witness therefore had no purpose except to attempt to impeach her prior testimony. Soh suggests no authority for such a course of action. Soh also argues that the State should not be permitted to present evidence it knows to be factually inaccurate. In general, we agree with this proposition, but here, the only issue was Thomas' credibility. What mattered to the jury's determination, therefore, was what Thomas knew, not what the lawyers knew. Asking Thomas what consideration he expected was not the presentation of factually false testimony. The trial court did not err in refusing to permit Soh to call the collateral witnesses.

The trial court was thorough and careful in protecting Soh's trial rights here, and as a result, the State's misconduct caused Soh no prejudice. We affirm the court's refusal to dismiss. Affirmed.

The balance of this opinion has no precedential value and will not be published, but will be filed for public record pursuant to RCW 2.06.040.

Violation of Speedy Trial Rights

A party has the right to one change of judge upon the timely filing of an affidavit of prejudice.[17] The affidavit must be filed before the judge makes a discretionary ruling.[18] In a criminal case, exercise of an affidavit of prejudice extends the speedy trial period by up to 30 days. [19] Soh complains the State's affidavit was improper here because the judge in question made a discretionary ruling on the State's attempt to compel Soh to say whether or not he planned to seek a continuance. Soh declined to do so.

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[17] RCW 4.12.040, .050.
[18] State v. Parra, 122 Wn.2d 590, 594, 859 P.2d 1231 (1993).
[19] CrR 3.3(c).

The court took no action, observing that it did not have the power to compel Soh to decide whether he would ever seek a continuance. As the judge himself later observed in honoring the affidavit of prejudice, this was not an exercise of discretion.[20]

Soh also contends an unrecorded colloquy, in which the court discussed with the parties whether Soh should be allowed to sit in on a witness interview, amounted to a discretionary decision. The judge found otherwise, and we agree. A discussion is not a discretionary ruling.

The State's affidavit of prejudice was timely, and Soh's speedy trial rights were not prejudiced. In addition, Soh did not object to the continuance of the trial date, and thereby waived any objection.

Alleged Mismanagement

Soh contends the court erred in denying his motion for dismissal under CrR 8.3(b) because the State's filing of multiple informations and its late disclosure of witnesses amounted to prejudicial misconduct. Governmental misconduct "need not be of an evil or dishonest nature, simple mismanagement is sufficient."[21] A showing of prejudice is required.[22]

Here, the first, second and fourth amendments to the information were simply housekeeping measures. The third was filed in

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20 See Parra, 122 Wn.2d at 597.

21 State v. Dailey, 93 Wn.2d 454, 457, 610 P.2d 357 (1980).

22 State v. Michielli, 132 Wn.2d 229, 240, 937 P.2d 587 (1997).

response to State v. Thomas, a new court decision invalidating the charging statutes.[23] The amendment reduced the charges from trafficking to possession. The amendment also added new offenses based on Soh's transactions with Thomas, which had come to light after the original information was filed.

Moreover, Soh did not seek a continuance to allow additional time to prepare his defense, and he does not explain how the alleged mismanagement or the late disclosure of several witnesses adversely affected the fairness of his trial, except to point out that because the facts of the dismissed charges were admitted under ER 404(b), he was required to meet them despite the dismissal. This is not, however, a showing of prejudice resulting from mismanagement. The trial court did not err in denying the motion to dismiss.

Suppression of Tape-Recorded Conversations

Soh also challenges the denial of his motion to suppress evidence of his conversations with an informant. He argues that probable cause did not exist for the judicial wire warrant because the informant was not shown to be credible and reliable, and that the application did not meet the statutory requirements for a judicial wire. Our review is limited to whether "the facts set forth in the application were minimally adequate to support the determination that was made.[24] Where probable cause for a judicial wire is based upon information provided by an informant, the application affidavit must contain information from which the court can determine the reliability of the informant's information, and the credibility and veracity of the informant.[25] A record of past successful assistance to police in

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[23] 103 Wn. App. 800, 14 P.3d 854 (2000), review denied, 143 Wn.2d 1022 (2001). Thomas held all provisions of the Criminal Profiteering Act except those relating to insurance fraud invalid as violating the single-subject and subject-in-title requirements of the Washington Constitution. Thomas, 103 Wn. App. at 809. Soh had been charged under the act with trafficking in stolen goods. The amended information eliminated those charges.

[24] State v. Knight, 54 Wn. App. 143, 150-51, 772 P.2d 1042 (1989).

[25] State v. Lope, 70 Wn. App. 259, 264, 856 P.2d 390 (1993).

arranging controlled sales leading to arrests may be sufficient to establish both reliability and credibility.[26] Here, the warrant application demonstrated that the confidential informant had been personally involved in auto theft schemes in the past, and had already assisted police by participating in the controlled sale to Soh of an engine he represented as stolen. Following this sale, the informant communicated with Soh via e-mail, advising him that he had additional engines for sale with shaved VIN numbers (identification numbers that had been ground off so as to make them untraceable to a particular stolen vehicle). These facts, and the plan to use the wire to record a second controlled sale, were a sufficient basis for the trial court's finding that the warrant application had adequately described the informant's record sufficient to establish probable cause.

Interception of private communications without consent is authorized only where there is a showing that "other normal investigative procedures with respect to the offense have been tried and have failed or reasonably appear to be unlikely to succeed if tried or to be too dangerous to employ. "[27] Soh argues that the warrant application did not meet this requirement. In particular, he alleges the State's application was based on boilerplate assertions and racial stereotypes regarding the defendant's potential dangerousness.

The warrant application described how the tone, inflection and volume of Soh and any conspirator(s)' voices, conveying meaning outside the words themselves, as well as the specific slang used by traffickers in stolen auto parts, were important to determining Soh's knowledge, an essential element of the crime. The application also described the difficulties of infiltrating and doing business with an organized operation such as Soh's. These assertions were based on Detective Liburdi's experience investigating auto theft and the nature of the ongoing investigation into Soh. They were particular, not boilerplate, and indicate serious consideration of why other investigative techniques would be inadequate. [28]

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[26] Lopez, 70 Wn. App. at 264.

[27] RCW 9.73.130(f)

[28] See State v. Manning, 81 Wn. App. 714, 720, 915 P.2d 1162 (1996); State v. Kichinko, 26 Wn. App. 304, 613 P.2d 792 (1980).

The warrant application also contained an assertion that Soh's business "[flits a pattern known to law enforcement. . . which is typically affiliated with organized crime and occurs frequently among individuals who have immigrated to the United States or Canada from Asian countries. These groups are known to belong to organized gangs, which engage in violence, including homicides. [29] The record does not reveal any evidence linking Soh to organized Asian gangs, and Soh argues that this assertion was designed to create an inference of dangerousness based on racial stereotypes. However, the statute requires a showing of dangerousness only if the other requirements of past or future inadequacy of normal investigatory methods have not been met. Here, the State made a particularized and racially neutral showing that normal methods appeared unlikely to succeed. Therefore, the reference to immigrants involved in organized crime is not material to the validity of the warrant.

Evidence of Bad Acts

The court admitted evidence that Soh purchased stolen engines from the informant in transactions for which Soh created no paperwork as relevant to knowledge and criminal intent. Soh contends this evidence should not have been admitted under ER 404(b), because these acts occurred subsequent to the crimes with which he was charged, and because the resulting charges were dismissed with prejudice.

ER 404(b) provides that "[e]vidence of other crimes, wrongs, or acts is not admissible to prove the character of a person in order to show action in conformity therewith." Such evidence may be admissible for other purposes, such as to indicate a common scheme and knowledge. The fact that the other acts occurred after the charged crimes is irrelevant. The rule refers not to prior crimes, wrongs or acts, but to other crimes, wrongs or acts.

Nor is the dismissal of criminal charges arising out of other acts controlling. The question is whether there was substantial evidence supporting a finding, by a preponderance of the evidence, that

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[29] Clerk's Papers at 570.

these transactions had occurred. [30] Soh argues only that dismissal of the charges makes a preponderance finding impossible. Soh cites no authority for this proposition, however, and we are not persuaded.

Moreover, as the court noted, these acts constituted bad acts only if the jury believed that Soh knew the engines were stolen. If it did, the relevance of this information outweighed its prejudice; if not, there was no prejudice. The court conditioned admission of this evidence on the State's showing that Soh had prepared no paperwork documenting his transactions with the informant, and also gave a limiting instruction. The trial court did not abuse its discretion in admitting the evidence under ER 404(b). [31]

Jury Instruction

Soh appeals the giving of Instruction 20:

> A "vehicle wrecker" means every person, firm, partnership, association, or corporation engaged in the business of buying, selling, or dealing in vehicles of a type required to be licensed under the laws of this state, for the purpose of wrecking, dismantling, disassembling, or substantially changing the form of a vehicle, who buys or sells integral second-hand parts of component material thereof, in whole or in part, or who deals in second-hand vehicle parts. [32]

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[30] State v. Burkins, 94 Wn. App. 677, 687, 973 P.2d 15 (1999).

[31] Soh also refers to, but does not further describe, an argument he made to the trial court that the WSP's sting operation constituted entrapment as a matter of law. We do not address this issue. See RAP 10.3(a)(5); Cowiche Canyon Conservancy v. Bosley, 118 Wn.2d 801, 809, 828 P.2d 549 (1992).

[32] Clerk's Papers at 123.

Soh argues the jury should not have been allowed to consider Soh's failure to possess a vehicle wreckers license. This argument is puzzling. The only reference to licensing requirements in the instruction is to the type of *vehicles* such wreckers deal in ("vehicles required to be licensed"). At trial, Soh objected only on grounds that the instruction's relevance was outweighed by its prejudicial effect. He may not assert a different objection on appeal. [33]

Inflammatory Remarks to Jury

Soh contends the deputy prosecutor committed misconduct in her closing argument by improperly arguing that a VIN label had been "staffed" or "jacked," while holding a transcript of the taped conversation to which she referred. In the transcript, the word was rendered as "stacked." Soh also argues that the deputy prosecutor's reference to him in her rebuttal argument as a "part-time crook" was inflammatory, especially in conjunction with the comments above. The State is granted wide latitude in drawing and expressing reasonable inferences from the evidence in its closing argument. [34] There is no misconduct when counsel does no more than argue facts in evidence and suggest reasonable inferences from that evidence. [35]

Here, the tape of the conversation was played for the jury. The fact that a transcriptionist interpreted a word as "stacked" rather than "jacked" did not foreclose other reasonable interpretations. In addition, Soh has not demonstrated a substantial likelihood that the deputy prosecutor's argument on this subject affected the jury's verdict.

Soh failed to make a timely objection to the words "part-time crook." He has therefore waived any claim of error "unless the remark is so flagrant and ill-intentioned that it caused an enduring and resulting prejudice that could not have been neutralized by an

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[33] See State v. Dent, 123 Wn.2d 467, 477-78, 869 P.2d 392 (1994).

[34] State v. Lawrence, 108 Wn. App. 226, 237, 31 P.3d1198 (2001).

[35] State v. Clapp, 67 Wn. App. 263, 274, 834 P.2d 1101 (1992).

admonition to the jury." [36] Soh has not demonstrated such prejudice.

Replaying of Tape for Jury

A recorded conversation between Soh and the informant was recorded pursuant to the judicially authorized wiretap, and was admitted under ER 404(b) to show knowledge and intent. The jury asked to hear the tape during deliberations. The trial court considered Soh's objection and permitted the jury to hear the tape once, in open court, without a transcript. This action was well within the court's discretion. [37]

Lack of Evidence of Corpus Delecti

Soh argues that his conviction violated the corpus delecti rule, because it was violated by his conviction based only on the uncorroborated testimony of an accomplice, since the allegedly stolen engines were never recovered. But "a conviction can rest upon the uncorroborated testimony of an accomplice, if the trier of fact, exercising due caution, believes the accomplice. [38] Moreover, the testimony of Soh's accomplice was corroborated by documentary evidence in the form of canceled checks for purchases of stolen engines, and by the testimony of Brad Woolridge. Soh's arguments are thus unavailing. Affirmed.

We CONCUR.

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[36] Lawrence, 108 Wn. App. at 237.

[37] Clapp, 67 Wn. App. at 273.

[38] State v. Hall, 46 Wn. App. 689, 691, 732 P.2d 524 (1987).

APPENDIX B

WASHINGTON STATE COURT OF APPEALS
DIVISION ONE

No. 48433-8-I

STATE OF WASHINGTON, RESPONDENT

v.

JEROME SOH, APPELLANT

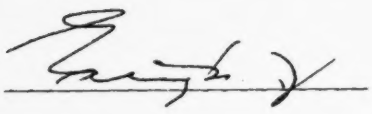
ORDER DENYING MOTION FOR RECONSIDERATION FILED MARCH 6, 2003

Appellant has filed a motion for reconsideration of the opinion entered February 3, 2003. The panel has considered the motion and determined it should be denied. NOW THEREFORE, it is hereby

ORDERED that the Appellant's motion for reconsideration is denied.

DATED this 6th, day of March, 2003.

FOR THE PANEL:



APPENDIX C

THE SUPREME COURT FOR THE
STATE OF WASHINGTON

No. 73836-0
C/A No. 48433-8-I

STATE OF WASHINGTON, RESPONDENT

v.

JEROME SOH, PETITIONER

ORDER DENYING PETITION FOR REVIEW
FILED SEPTEMBER 30, 2003

Department II of the Court, composed of Chief Justice Alexander and Justices Madkn, Ireland, Chambers and Fairhurst, considered this matter at its September 30, 2003, Motion Calendar, and unanimously agreed that the following order be entered.

IT IS ORDERED:

That the Petition for Review is denied.

DATED at Olympia, Washington this 30th day of September 2003.